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# In the Supreme Court of the United States

OCTOBER TERM, 1983

COMMITTEE FOR AN INDEPENDENT P-I, ET AL.,
PETITIONERS

*v.*

WILLIAM FRENCH SMITH, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether in this case the failure of respondent Hearst to consider the possibility of selling its failing newspaper to a new owner precluded approval by the Attorney General of a joint operating arrangement under the Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*

2. Whether the Attorney General's approval of a joint operating arrangement is properly made without regard to the ownership of the failing newspaper.

3. Whether the Newspaper Preservation Act requires the Attorney General to find, in order to approve a joint operating arrangement, that the arrangement would not adversely affect other newspapers in the area and is the least anticompetitive approach possible.

4. Whether the Newspaper Preservation Act violates the First Amendment on the grounds that (a) as applied in this case, it may work to the disadvantage of other newspapers in the area, and (b) on its face, it is vague and overbroad.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 704 F.2d 467. The opinion of the district court (Pet. App. 33a-51a) is reported at 549 F. Supp. 985.

### JURISDICTION

The judgment of the court of appeals was entered on April 21, 1983. The petition for a writ of certiorari was filed on July 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. The Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*, provides a mechanism to preserve the editorial voices of failing newspapers. Under the Act, the Attorney General is empowered to grant a limited immunity from federal

antitrust laws to newspapers entering into a joint operating arrangement. In order to grant an application for such immunity, the Attorney General must find (a) that one of the applicants is a "failing newspaper," which is defined in the Act as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure" (15 U.S.C. 1802(5)), and (b) that approval of the joint operating arrangement would effectuate the policy and purpose of the Act (15 U.S.C. 1803(b)).

Pursuant to Department of Justice regulations, applications for joint operating arrangements are referred to the Assistant Attorney General in charge of the Antitrust Division, who can recommend either that the arrangement be approved or that a hearing be held before an administrative law judge. 28 C.F.R. 48.7. If a hearing is held, the Antitrust Division becomes a party to the proceeding, and other interested persons may intervene. 28 C.F.R. 48.10(b) and 48.11. Final authority to approve or disapprove the application rests with the Attorney General, whose decision is to be based on the hearing record, the ALJ's recommendation, and any exceptions filed thereto. 28 C.F.R. 48.13(b).

If the Attorney General approves the application, a joint operating arrangement can be undertaken by the newspapers "pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to" a number of commercial activities specified in the Act, including allocation of production facilities, advertising and circulation solicitation and rates, and revenue distribution. 15 U.S.C. 1802(2). However, the Act requires that there be "no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined" (*ibid.*). Under the Act, the Attorney General's approval provides an exemption from the antitrust laws for the joint operating arrangement itself (15 U.S.C.

1803(b)), but does not "exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity" (15 U.S.C. 1803(c)).

2. In March 1981, respondents Seattle Times Company, the owner of the Seattle Times, and the Hearst Corporation, owner of the Seattle Post-Intelligencer ("P-I"), filed an application for approval of a joint operating arrangement covering those two newspapers (Pet. App. 2a). As the Antitrust Division recommended, the Attorney General appointed an administrative law judge to conduct a hearing on the application. The Attorney General also permitted petitioners to intervene in the proceedings in opposition to the application.

After a lengthy hearing, the ALJ recommended that the application be granted (Pet. App. 62a-153a). Based on his analysis of conditions within the newspaper industry in general and the poor financial situation of the P-I in particular, the ALJ concluded that the P-I was caught in a "downward spiral" in which a newspaper's declining circulation and advertising feed on one another and force it into financial failure (*id.* at 120a, 126a, 129a-130a). He found that the P-I had lost money in every year since 1969 and had a cumulative loss of more than $14 million in the period 1969-1980 (*id.* at 92a); in contrast, the Times had been consistently profitable during those years (*id.* at 93a). The ALJ also found that the P-I would likely continue to lose money in the future (*id.* at 114a-115a). The ALJ further concluded that the financial condition of the P-I was not due to any mismanagement by respondent Hearst and that Hearst "did everything [it] could in [its] best judgment to remedy the situation" and "tried urgently * * * to return the Post-Intelligencer to profitability" (*id.* at 106a; see also

*id.* at 112a, 143a). The ALJ also considered various alternatives for improving the financial condition of the P-I, but found that the "evidence does not support a conclusion that any of these offer the prospect of reversing the Post-Intelligencer's losses" (*id.* at 134a).

In view of "the long-term history of uninterrupted declines in every important category of the Post-Intelligencer's operations" (Pet. App. 129a), the ALJ determined that the P-I "has fallen so far behind, the probability is that its decline is irreversible" (*ibid.*). Furthermore, "the evidence does not establish that new management would be any more successful than Hearst and current management of the Post-Intelligencer in returning it to profitability" (*id.* at 112a). Finally, the ALJ concluded that "[i]f the Post-Intelligencer were a free standing, separate and independent newspaper, not owned by Hearst, the record in this proceeding is sufficient to prove that it would be in probable danger of closure. * * * Were it not for infusions of capital from Hearst, the probabilities are that the Post-Intelligencer would have failed long ago" (*id.* at 139a).

The Attorney General accepted the ALJ's recommendation and approved the application (Pet. App. 53a-61a). In particular, the Attorney General noted the ALJ's findings (*id.* at 57a)

> that the P-I had lost in excess of $14.3 million since 1969, that its competitive share of newspaper circulation and advertising revenue in Seattle had eroded substantially (and continues to decline), and that new management probably could not, based upon the record, return the P-I to profitability * * *.

The Attorney General also noted the ALJ's determinations that the relationship between Hearst and P-I was "generally reasonable and mutually beneficial" (*ibid.*) and "that no allegation of culpable mismanagement could be supported

by the record" (*id.* at 58a). And the Attorney General found that the ALJ's "conclusions both that the new management probably would not improve the P-I's financial prospects and that the P-I is a 'failing newspaper' under the Act are amply supported by the record" (*id.* at 60a n.*). Accordingly, the Attorney General adopted all of the findings and conclusions of the ALJ with the exception of Finding No. 158 (*id.* at 55a-56a), in which the ALJ had found that the P-I could "in all probability be sold at fair market value" (*id.* at 136a); the Attorney General concluded there was no evidentiary support in the administrative record for this finding (*id.* at 56a, 60a n.*).

3. Following the Attorney General's determination, petitioners filed this action in the United States District Court for the Western District of Washington to enjoin the joint operating arrangement. The district court overturned the Attorney General's decision on the ground that his ruling regarding Finding No. 158, concerning possible sale of the P-I, was arbitrary and capricious (Pet. App. 40a). In the court's view, "[w]here the record establishes that there are competent businessmen ready and willing to tackle the management problems of the P-I, the burden of proof rests upon the applicants for the [joint operating arrangement] to demonstrate that the new owners could not make the P-I succeed" (*id.* at 45a-46a). Since Hearst had generally indicated that the P-I was not for sale (*id.* at 41a), "[t]here has been no fair opportunity for prospective buyers to prepare and present their plans to make the P-I profitable" (*id.* at 46a). Thus, the court reversed the Attorney General's approval of the joint operating arrangement because "there are ready and willing buyers who present[ed] themselves" and Hearst had not "carr[ied] the burden of demonstrating that none of those buyers could continue to operate the P-I as an independent daily" (*ibid.*).

Although it set aside the Attorney General's decision on this ground, the district court rejected petitioners' other challenges to the approval of the joint operating arrangement. The court held that the evidence in the record supports the conclusion that the P-I probably could not have continued to exist without Hearst's backing (Pet. App. 46a-47a) and that the "findings and conclusions regarding the P-I's financial condition must stand" (*id.* at 47a). The court also ruled, contrary to petitioners' contentions, that the Attorney General was not required to examine possible injury to competing newspapers from the joint operating arrangement or to determine that the arrangement is the least restrictive alternative possible (*id.* at 47a-48a). Finally, the court ruled that the Newspaper Preservation Act does not violate the First Amendment, concluding that the limited antitrust exemption offered by the Act does not license or regulate the content of speech, that any harm to other newspapers from the joint operating arrangement was speculative, and that the Act is not overbroad or vague (*id.* at 48a-50a).

4. The court of appeals reversed the judgment of the district court and reinstated the Attorney General's approval of the joint operating arrangement (Pet. App. 1a-30a). The court first ruled that the Attorney General had correctly declined to adopt Finding No. 158 on the possible sale of the P-I (*id.* at 13a-15a). In addition, the court held that while there is no per se requirement that an attempt to sell the newspaper be made in order to prove that reasonable alternatives to the joint operating arrangement do not exist (*id.* at 15a), "proof of interested purchasers is [not] irrelevant" (*ibid.*). Rather, "[t]he existence of interested buyers may be relevant to th[e] determination" whether "the newspaper [is] suffering losses which more than likely cannot be reversed[.] * * * Also, poor management practices * * * may show that, with managerial improvement, the paper's

economic problems can be overcome" (*id.* at 19a). Thus, " 'alternatives' to a [joint operating arrangement] are relevant to both the causes of a newspaper's financial decline and its future prospects" (*id.* at 20a).

Turning to the "critical question * * * whether it was shown that the P-I's financial condition was such that new management might be successful in reversing the P-I's difficulties" (Pet. App. 20a), the court found that "[t]here is sufficient evidence in the record supporting a negative answer" (*ibid.*). In particular, after reviewing the relevant evidence and findings (*id.* at 20a-21a), the court upheld the determination that new management would not likely be any more successful than Hearst in achieving profitability for the P-I (*id.* at 21a). And given "the absence of a showing that there is a likelihood new management would succeed, Hearst's failure to consider purchase inquiries lost importance" (*ibid.*). Accordingly, the court held that "[w]hen the proponents of the [joint operating arrangement] established, as they did here, that the paper was managed reasonably and its trend toward failure is irreversible *under any management*, we have no difficulty concluding that the burden of proof has been met" (*id.* at 22a (emphasis in original)).

In addition, the court of appeals agreed with the district court that petitioners' other attacks upon the Attorney General's approval of the joint operating arrangement were without merit. The court held that it was sufficient for Hearst to show that the P-I was "in dire financial trouble" and "would probably be closed" "but for the ownership of Hearst" (Pet. App. 23a). The court rejected petitioners' argument that Hearst also was required to demonstrate that it would not continue to publish the P-I if the joint operating arrangement were disapproved, finding that the Act —which defines a "failing newspaper" as one that, "*regardless of its ownership or affiliations*, is in probable danger of

financial failure" (15 U.S.C. 1802(5) (emphasis added)) — intended "that the ailing newspaper should be analyzed as a free-standing entity, as if it were not owned by a corporate parent. * * * [G]enerally, ownership is not to be a factor in considering whether a newspaper is failing" (Pet. App. 24a, 25a). Thus, Hearst had only to prove, as it did, that the "P-I, as a separate entity, is in severe financial trouble and would likely close if not owned by Hearst" (*id.* at 25a).

The court of appeals also agreed with the district court that the Attorney General was not required either to analyze the potential impact of a proposed joint operating arrangement on other newspapers in the market or to limit the arrangement to the least anticompetitive approach possible (Pet. App. 25a-28a). The court concluded that Congress had itself considered the impact the Act might have on other newspapers and had made "a policy determination that the preservation of editorial diversity through joint operating arrangements outweighs any potentially anticompetitive effects this antitrust exemption might cause. * * * Congress considered the question of harm to other newspapers and resolved it in favor of the antitrust exemption" (*id.* at 26a). In addition, the court found no merit to petitioners' argument that the joint operating arrangement at issue here would not effectuate the policy and purpose of the Act (*id.* at 27a).

Finally, the court of appeals agreed with the district court that, while petitioners' First Amendment claims "are imaginative, they lack substantial merit" (Pet. App. 28a). The court ruled that the Act — which is designed to promote and aid the press —neither affects the content of speech nor discriminates among newspapers. Thus, the court found that the Act, in modifying the scope of the antitrust laws, is similar to other economic regulatory statutes applicable to the newspaper industry that have been held to be valid (*id.* at 28a-29a). In addition, the court held

that, since the Attorney General is required to base his decision regarding a proposed joint operating arrangement on the policies and requirements specified in the Act, the Act contains no vague or overbroad delegation of power (*id.* 29a-30a).

## ARGUMENT

Petitioners acknowledge (Pet. 2-3, 5), as the court of appeals observed (Pet. App. 2a), that the issues of interpretation under the Newspaper Preservation Act are ones of first impression and that the decision below does not conflict with any decision of this Court or the other courts of appeals. Furthermore, the decision upholding approval of the joint operating arrangement turns on a combination of factual determinations that are adequately established in the record and constructions of the Newspaper Preservation Act that (with one exception, where the district court disagreed) the ALJ, the Attorney General, the district court, and the court of appeals have unanimously adopted contrary to petitioners' contentions. Finally, petitioners' First Amendment arguments have been consistently rejected at all levels of this case as well as in the other cases that have considered them. Accordingly, further review is not warranted.

1. Petitioners first argue (Pet. 9-16) that, in order for the proposed joint operating arrangement to be approved, respondent Hearst could not decline to deal with prospective purchasers of the P-I. In their view, "[t]he correct rule is that where qualified buyers come forward, the applicant-owner must be willing to consider a sale so as to permit the new ownership alternative to be explored. If the owner refuses to do that — as Hearst did here — the applicants' burden of negating the availability of competition-preserving alternatives cannot be met" (Pet. 15).[1]

[1]It is unclear whether petitioners contend that the failure to consider the sale of the newspaper creates a rebuttable presumption against the joint operating arrangement — as the district court seemed to hold (see Pet. App. 46a) — or an absolute bar to approval of the arrangement.

This interpretation of the statute is unfounded. Petitioners have pointed to nothing in the text or history of the Act that imposes a requirement to sell, or to attempt to sell, a failing newspaper. Moreover, such a precondition to the approval of a joint operating arrangement would largely resurrect the "failing company doctrine" applied in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 137-138 (1969) — a doctrine that, as the court of appeals (Pet. App. 9a-12a, 15a) correctly observed, the Newspaper Preservation Act was expressly designed to supersede. Thus, the Attorney General (*id.* at 59a-60a)[2] and the court of appeals (*id.* at 15a) correctly concluded that there is no per se sale requirement in the Act.[3]

To be sure, as the Attorney General (Pet. App. 60a n.*) and the court of appeals (*id.* at 19a-20a) recognized, the existence of interested potential purchasers may be relevant to the issues whether and for what reasons the newspaper is suffering financial losses that are not likely to be reversed. For example, the presence of prospective buyers might indicate that the economic prospects for the paper are not as unpromising as the current owner believes. It also might

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[2]Because the Attorney General is charged with administration of the Act, his views are entitled to great deference. See *Howe* v. *Smith*, 452 U.S. 473, 485 (1981); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

[3]Petitioners also rely (Pet. 10-11) on the standards of the Bank Merger Act (12 U.S.C. 1828) as applied in *United States* v. *Third National Bank*, 390 U.S. 171 (1968), which, they contend, Congress intended to incorporate into the Newspaper Preservation Act. Whatever the general applicability of Bank Merger Act principles in this context, it suffices here to note that they can be satisfied by a demonstration that those seeking to merge "made reasonable efforts to solve the management dilemma of * * * [the bank] short of merger with a major competitor but failed in these attempts, *or that such efforts would have been unlikely to succeed*" (*United States* v. *Third National Bank*, *supra*, 390 U.S. at 189 (emphasis added)). As discussed below, the record in this case establishes that new management would not likely have been able to rectify the financial problems of the Post-Intelligencer.

indicate that the newpaper's difficulties are due to mismanagement and could be cured by a new owner. In this way, the sale of the P-I as an "alternative[] to a [joint operating agreement is] relevant to the determination that * * * [the] newspaper qualifies under the Act" (*id.* at 13a).

On this question, however, "Hearst met its burden of showing that the alleged alternatives did not offer a solution to the P-I's difficulties" (Pet. App. 13a). As the court of appeals discussed (*id.* at 3a, 5a-6a, 20a) and as we have summarized above (see pages 3-4, 7, *supra*), the record amply shows that the P-I's "trend toward failure is irreversible *under any management*" (Pet. App. 22a (emphasis in original)) and that new management would not likely be successful in improving its financial condition. In these circumstances, "Hearst's failure to consider purchase inquiries lost importance" (*id.* at 21a) with respect to the critical question under the Act —whether the P-I was in probable danger of financial failure. Accordingly, the Attorney General's approval of the joint operating arrangement was not improper.

2. Petitioners next assert (Pet. 16-20) that the Act requires Hearst, as the parent corporation of the P-I, to demonstrate that it would close the newspaper in the event the joint operating arrangement were not approved. This contention was rejected by the ALJ, the Attorney General, the district court, and the court of appeals.

By its terms, the Act provides that the financial prospects of an ailing newspaper are to be considered "regardless of its ownership or affiliations" (15 U.S.C. 1802(5)). In addition, as the court of appeals explained (Pet. App. 24a-25a), the legislative history of the Act also indicates that the newspaper generally should be considered without regard to affiliated enterprises. See, *e.g.*, S. Rep. No. 91-535, 91st Cong., 1st Sess. 5 (1969); 116 Cong. Rec. 2006 (1970)

(remarks of Sen. Hruska). Here, the record amply demonstrates "that the P-I is in dire financial trouble and, without the backing of Hearst, it would probably close" (Pet. App. 23a). Thus, considered without regard to its ownership by Hearst, the P-I is clearly in probable danger of financial failure.[4]

3. Petitoners also claim (Pet. 20-24) that the joint operating arrangement should not have been approved because it would adversely affect other newspapers in the area and is not the least anticompetitive measure possible. Once again, this claim has been unanimously rejected at all stages of the litigation.

As the court of appeals explained, the legislative history of the Act demonstrates that Congress made "a policy determination that the preservation of editorial diversity through joint operating arrangements outweighs any potentially anticompetitive effects this antitrust exemption might cause" (Pet. App. 26a). See, *e.g.*, H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. 4 (1970). Moreover, by providing that only certain functions may be combined (15 U.S.C. 1802(2)) and that the joint operation may not engage in any predatory practice or other conduct that "would be unlawful under any antitrust law if engaged in by a single entity" (15 U.S.C. 1803(c)), Congress has balanced the competing interests and specified the preconditions to and extent of an

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[4]Petitioners advert to several factors that they claim show that the P-I is actually in a good position to succeed (Pet. 19). However, the ALJ examined these claims at some length (Pet. App. 80a-94a, 112a-130a) and described them as "Pollyanna-like assertions" that are "little more than hopeful speculation and conjecture, ungrounded in reality" (*id.* at 130a). In addition, petitioners contend (Pet. 18) that certain information based on an accounting analysis of Hearst's overall operations shows that respondent Hearst is benefitting financially from continued operation of the P-I. This argument again ignores the plain wording of the Act, which places the focus on the individual newspaper rather than on its owner.

approved joint operating arrangement. And, in fact, the legislation was passed over the objections — which petitioners essentially reiterate in this lawsuit — that it might result in competitive harm to small or new papers (see Pet. App. 26a) and that it was an unnecessary and unduly broad exemption from the antitrust laws in that, *e.g.*, it imposed no time limits on joint operations (see *id.* at 27a). Since Congress has resolved this policy issue, the Attorney General had no occasion to reconsider the matter in approving the joint operating arrangement here. See *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 50 n.22 (1981).

4. Petitioners lastly contend (Pet. 24-30) that the Newspaper Preservation Act violates the First Amendment because (a) as applied in this case, it allegedly worked to the detriment of other newspapers in the area, and (b) on its face, it represents a vague and overbroad delegation of authority to the Attorney General. These arguments are insubstantial and were correctly rejected both at every stage of this litigation and by the only other courts to consider such claims. See *Bay Guardian Co.* v. *Chronicle Publishing Co.*, 344 F. Supp. 1155 (N.D. Cal. 1972); *Honolulu* v. *Hawaii Newspaper Agency*, 7 Media L. Rep. (BNA) 2495 (D. Hawaii 1981).

a. Petitioners assert that the Newspaper Preservation Act is unconstitutional as "disparate economic regulation which favors some newspapers over others" (Pet. 24). But the Act — which simply provides a limited exemption from antitrust liability and serves "to enhance * * * First Amendment values" by preserving the editorial voice of the failing newspaper (*Buckley* v. *Valeo*, 424 U.S. 1, 93 n.127 (1976)) — does not prefer some newspapers to others. Rather, it provides a generally applicable exemption that is available to all newspapers in probable danger of financial failure. Any effect that this content-neutral statute might conceivably have on other newspapers in the area (see Pet. App. 28a,

48a) is at most an incidental consequence of the modification in the system of antitrust regulation that Congress found appropriate to protect and promote a diversity of editorial views, and as such it does not render the Act unconstitutional.[5]

b. Nor is the Act a vague and overbroad delegation of "discretionary licensing power" to the Attorney General (Pet. 27). First, the Act does not involve a "license" at all in the sense that the term is used in the First Amendment context to mean a system of prior restraint on speech or the press. See, *e.g.*, *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-151 (1969). Plainly, the limited antitrust exemption created by the Act involves no such prior restraint.

Furthermore, as the courts below held, the Act is neither vague nor overbroad. Under the two-part test in the Act, the Attorney General must detemine whether the newspaper is in probable danger of financial failure and, if so, whether approval of the proposed joint operating arrangement would effectuate the policy and purpose of the statute. See 15 U.S.C. 1802(5) and 1803(b). Especially in light of the Act's express declaration of congressional policy to "maintain[] a newspaper press editorially and reportorially independent and competitive * * * [and] to preserve the publication of newspapers [in probable danger of financial

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[5] *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, No. 81-1839 (Mar. 29, 1983), upon which petitioners rely (Pet. 24, 25-26), is not to the contrary. In that case the Court struck down a state statute that imposed a special tax on the press and effectively applied to only a few newspapers (slip op. 1). The Court found that such a statute "burdens rights protected by the First Amendment" (*id.* at 7) because it "created a special tax that applies only to certain publications" (*id.* at 6) and could "operate * * * to check critical comment by the press * * * [in a manner] not unrelated to suppression of expression" (*id.* at 10). In contrast, the Newspaper Preservation Act furthers rather than burdens or suppresses editorial diversity and does not discriminate among newspapers in its applicability.

failure]" (15 U.S.C. 1801), these provisions are well within constitutional bounds. See, *e.g.*, *Arnett* v. *Kennedy*, 416 U.S. 134, 158-162 (1974); *CSC* v. *National Association of Letter Carriers*, 413 U.S. 548, 578-579 (1973); *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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